

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

COMMUNITY HOLDINGS OF INDIANA,)	
INC., d/b/a)	
THE HERALD BULLETIN,)	
)	
Employer,)	Case 25-RC-10503
)	
and)	
)	
GRAPHIC COMMUNICATIONS)	
INTERNATIONAL UNION LOCAL 17M,)	
)	
Petitioner.)	

PETITIONER'S BRIEF IN SUPPORT OF REQUEST FOR REVIEW

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PETITIONER'S BRIEF IN SUPPORT OF REQUEST FOR REVIEW

The Petitioner, Graphic Communications International Union Local 17M (the "Union" or "Petitioner"), by counsel, submits this brief in support of its Request for Review of the Regional Director's Decision and Order dated September 8, 2010 concluding that the petitioned-for newspaper haulers and carriers are not employees but independent contractors not covered or protected by the Act. Contrary to the Regional Director, the individuals it has petitioned to represent are employees within the meaning of Section 2(3) of the Act rather than independent contractors as contended by the Employer. To the extent *St. Joseph News-Press*, 345 NLRB 474 (2005), and *Arizona Republic*, 349 NLRB 1040 (2007), support the Regional Director's Decision and/or are indistinguishable, those decisions should be overruled.

I. INTRODUCTION

Upon a petition filed by the Union in Case 25-RC-10503, a hearing was held on August 19, 2010. The Petitioner and the Employer were also parties in Case 25-RC-10454, and they stipulated that the issue in that case is the same as in this one and that the testimony and exhibits presented in Case 25-RC-10454 should be used as the record for purposes of this case. Thus, references herein to (Tr. ____) are to the record created in Case 25-RC-10454.

On March 18, 2009 the Regional Director dismissed the petition Case 25-RC-10454 after concluding, based on *St. Joseph News-Press* and *Arizona Republic*, that the

haulers and carriers sought to be included in the unit were independent contractors rather than employees covered by the Act. Petitioner thereafter filed a Request for Review of that Decision and Order. On April 21, 2009 then Members Liebman and Schaumber issued an Order denying Petitioner's Request for Review.¹ In a footnote to that Order, Member (now-Chairman) Liebman noted that she had dissented in *St. Joseph News-Press* and *Arizona Republic*, but that in the absence of a majority to revisit those rulings she felt constrained for institutional reasons to follow them as extant law for purpose of deciding that case. The Board now has three new members, none of whom was on the Board at the time those cases were decided. Accordingly, as suggested by Chairman Liebman, the Board should revisit those decisions and, after acknowledging their fundamental unsoundness, adopt the reasoning in her dissenting opinions in those cases.

The issue for resolution in this case is whether the approximately 15 haulers and 75 motor route carriers utilized by the Employer, Community Holdings of Indiana, Inc. d/b/a The Herald Bulletin ("Herald Bulletin," "Employer" or the "Newspaper"), who Petitioner proposes be included in the petitioned-for bargaining unit, are statutory employees as Petitioner contends, or, as the Employer contends, they are independent

¹ The United States Supreme Court on June 17, 2010 in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, held that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegate group of at least three members of the Board had to be maintained. Thus, the Order denying Petitioner's Request for Review in Case 25-RC-10454 has no precedential value for purposes of this case.

contractors who are not subject to the Act's protections.² For the reasons set forth herein, and particularly because of their economic dependence upon the Newspaper, these haulers and carriers should be found to be employees covered by the Act and therefore, the Board should order the Regional Director to direct an election among the employees in the petitioned-for unit.

II. STATEMENT OF FACTS

A. **Herald Bulletin Background**

The Employer publishes a daily newspaper with approximately 14,500 subscribers, primarily in Madison County and portions of its adjoining counties. (Tr. 9, 185-86). It is owned by Community Holdings, Inc., an Alabama-headquartered company that owns many other newspapers both in and out of Indiana. (Tr. 74-75, 184). The Herald Bulletin employs less than ninety (90) persons that it considers employees at its offices in Anderson, Indiana. (Tr. 187). As of the date of the hearing in the prior case, the Herald Bulletin contracted with approximately fourteen (14) haulers and ninety (90) carriers to distribute its newspaper on a daily basis,³ all of whom the Herald Bulletin claims to be independent contractors. (Tr. 10-11). However, the Regional Director noted in his

² The parties stipulated that the haulers and carriers share a sufficient community of interest to be considered an appropriate bargaining unit, should they be found to be employees within the meaning of the Act. (Tr. 295-96).

³ As discussed more fully below, the Herald Bulletin also has contracts with other newspapers such as the Indianapolis Star to deliver their products to customers in the Herald Bulletin's delivery area, and the haulers and carriers are required to deliver these products, too.

Decision and Order in the present case (at n. 3) that those numbers appear to be slightly different as of the present.

B. Managerial/Supervisory Structure

Henry Bird is the publisher of the Herald Bulletin. (Tr. 186-87). The circulation director, Amy Winter, reports to Bird. (Tr. 76). Susan Brooks, the distribution manager, and Tony Rettig, the home delivery manager, report to Winter. (Tr. 76). Brooks generally oversees the haulers. (Tr. 9-10, 79). Rettig oversees the four (4) district managers – currently, Eric Francis, John Rodebush, Dana Vance and Mike Franklin – who are considered employees and who, in turn, generally oversee the work of the carriers. (Tr. 76-77). Practically speaking, Brooks and the district managers have fairly equal daily interaction with the haulers and the carriers, and will cover for each other in their absence. (Tr. 76-77, 79).

The district managers are responsible for securing replacement carriers, but both Brooks and Rettig also will work to fill such vacancies as needed. (Tr. 83-86). All of them are familiar with the standard form agreements for carriers, and all are capable of “negotiating” agreements with them. (Tr. 86). Although these Herald Bulletin employees do not regularly deliver newspapers (Tr. 32), district managers occasionally fill in for haulers and carriers when routes are unfilled, where there have been undelivered or damaged papers, or on occasions when a carrier is unable to perform the job. (Tr. 77).

C. Haulers

The Herald Bulletin contracts with approximately fourteen (14) haulers, requiring them to sign “independent contractor” agreements. (Tr. 12; Employer’s Ex. 1). It does not have any persons who it considers employees that perform the work of haulers, and has always considered them “independent contractors.” (Tr. 12, 90). No experience is necessary to become a hauler. (Tr. 90). Susan Brooks, the distribution manager, interacts with the haulers on a daily basis.⁴ (Tr. 9-10). She has negotiated approximately ninety percent (90%) of the hauler contracts. (Tr. 9-10).

The haulers pick up bundles of newspapers at one of two dock points – in Anderson and Greenfield – and drop them at designated locations for the carriers. (Tr. 11). About half of the haulers pick up at each location. (Tr. 15). Newspapers are generally available to haulers for pick-up at 12:30 a.m. in Greenfield, and between 1:30 and 2:30 a.m. in Anderson. (Tr. 15-16). The Herald Bulletin suggests to haulers that they pick up their papers by 2:00 or 2:30, but that is not contractual. (Tr. 205-06). Haulers are required as part of their agreements to have made their deliveries to distribution points by no later than 3:30 a.m. on weekdays and weekends. (Tr. 90-91). In addition to dropping papers off for carriers, haulers also deliver papers to convenience stores, grocery stores,

⁴ Brooks was the Herald Bulletin’s only witness at the hearing, other than the brief rebuttal testimony of Publisher Henry Bird. The Herald Bulletin produced none of its district managers, nor did it produce their supervisor, Tony Rettig, the group of employees primarily responsible for overseeing the carriers, the larger of the two groups of employees the Union seeks to represent.

and vending boxes. (Tr. 203). A hauler might have as many as thirty (30) drops, including the home delivery drops and single copy drop spots. (Tr. 203-04). Single-copy haulers are usually done by 5:00 to 5:30 a.m. (Tr. 205).

There are a little more than a dozen locations where the haulers drop the bundles for carriers. (Tr. 11). Approximately five (5) to six (6) carriers pick up their papers from each location. (Tr. 18). The Herald Bulletin chooses the drop-locations – places like banks and shopping centers – trying to keep them at convenient locations close to carriers' delivery areas. (Tr. 11, 18). Although carriers and haulers can make suggestions about drop-points, the Herald Bulletin ultimately designates these locations. (Tr. 18-19, 158-59).

When haulers pick up their bundles, there is a manifest showing the drop locations and number of papers to drop. (Tr. 17-18). As to the sequence of the drops, the hauler is permitted to decide that, although he or she will have typically obtained a sequence from the previous hauler on the route. (Tr. 19). Any changes to the sequence are communicated to the Herald Bulletin, which updates its computer system to show the new route. (Tr. 20).

The Herald Bulletin requires haulers to sign a document entitled Independent Contractor Hauler Agreement (the "Hauler Agreement"), a document it originally prepared. (Employer Ex. 1; Tr. 82-83). Paragraph 1 of the agreement, entitled "Independent Contractor Status," provides, in pertinent part:

Contractor is an independently established business and desires to contract to deliver newspapers and other associated items (hereinafter “product”) published and/or provided by publishers. Both contractor and publisher fully and freely intend to create an independent contractor relationship under this contract

(Employer Ex. 1, p. 1). This paragraph, like most of the rest of the agreement, is completely non-negotiable. (Tr. 89-90). In fact, the Herald Bulletin will “negotiate” over very few terms in the document, and those negotiations, to the extent they take place, are extraordinarily limited.

The Hauler Agreement requires the contractor to pick up the product “each day”⁵ and the product be taken to “all distribution points on the trucking manifest and to meet the established delivery time established for each drop location.” (Employer Ex. 1, p. 1). The Hauler Agreement also permits the Herald Bulletin to alter, consolidate, delete or otherwise change the route in its sole discretion on fourteen (14) days prior written notice to the hauler, and provides that the hauler has no property interest in or right to the route. (Employer Ex. 1, p. 1).

Haulers are required to provide their own vehicles to perform their work, for which the haulers are financially responsible, and haulers can use whatever vehicle they choose. (Tr. 29-30). The hauler is prohibited by terms of the Hauler Agreement from displaying the logo of the Herald Bulletin on any vehicle owned or used by the contractor. (Employer Ex. 1, pp. 1-2). The hauler is required to maintain automobile liability

⁵ Because the Herald Bulletin is published every day, 365 days per year, this means that the haulers are agreeing to work (or obtain a substitute) every day of their agreement.

insurance on all vehicles used to distribute or deliver the products. (Employer Ex. 1, p. 2).

Although the Hauler Agreement permits the hauler to hire substitutes or employees without approval from or notification to the Herald Bulletin and at their own expense, (Tr. 21), it also prohibits the hauler from assigning the contract to others, and further, the Hauler Agreement contains a provision requiring the hauler himself to devote substantial time to the work:

Contractor agrees that contractor's personal attention to fulfilling his contractual obligations was a substantial inducement to publisher to enter into this contract and contractor agrees to personally devote such time as is necessary to fulfill contractor's obligations under this contract.

(Employer Ex. 1, p. 3). The contract permits either party to terminate it for any reason without cause upon thirty (30) days written notice to the other party. (Employer Ex. 1, p. 4; Tr. 14).

Among the few terms of the Hauler Agreement that are negotiable is the length of the contract. Haulers generally sign on for anywhere between three (3) months to one (1) year, with some agreements lasting for six (6) or nine (9) months. (Tr. 14). The agreement requires the hauler to post a bond, at his expense, the amount of which has ranged from \$300 to \$500. (Tr. 20-21).

Although the rate of compensation is negotiable, in theory, there are tight limits on those negotiations. Haulers are offered a flat rate as a starting point in negotiations based

upon the historical amount paid and what the Herald Bulletin believes is feasible. (Tr. 23, 93). If the hauler and the Herald Bulletin cannot come to an agreeable rate, the hauler does not take the route. (Tr. 93-94).

The agreed-upon flat rate is paid twice each month, and depends upon the number of papers delivered and the number of drops. (Tr. 23-24, 93). The timing of these payments is not negotiable. (Tr. 95-96). Brooks testified that each of the fourteen (14) haulers have different flat rates, as the rate paid depends upon the number of papers and drops. (Tr. 23-24). The lowest flat rate is \$150, and as such, this person is paid \$300 each month, but Brooks was unable to testify as to the top rate. (Tr. 24).

The Herald Bulletin does not withhold taxes from the haulers' pay, and it issues a 1099 to them at year end. (Tr. 24-25). The Herald Bulletin does not offer vacation, medical benefits, life insurance, paid sick days, 401(k) or retirement benefits, paid holidays, or funeral leave to haulers, all benefits that it pays to the persons it considers employees. (Tr. 25-26). Although the Herald Bulletin does not track the attendance of haulers, the haulers are, of course, obligated to work every day or have someone cover their route. (Tr. 26-27). There is no dress code for haulers. (Tr. 31). Although the Herald Bulletin does not provide worker's compensation coverage, it does facilitate the purchase of such coverage by haulers and carriers and deducts the premiums from their checks. (Tr. 28-29, 166-67). The price for this coverage is \$2.75 every paycheck, twice a month. (Tr. 168).

The Herald Bulletin does occasionally invite haulers to meetings and offers them such things as coffee and donuts, but Brooks claims no business is conducted at these meetings. (Tr. 27-28).

Haulers are permitted to have more than one (1) route, and some have as many as five (5) routes. (Tr. 14-15). About three (3) of the haulers are also contracted as carriers. (Tr. 15; 207). Haulers are entitled to work other jobs. (Tr. 31). Some haulers are retirees. (Tr. 32).

D. Carriers

The Herald Bulletin contracts with approximately 90 carriers. (Tr. 32). The Herald Bulletin requires carriers to sign a standard-form contract entitled Independent Contractor Distribution Agreement (“Carrier Agreement”), and has always considered carriers to be “independent contractors.” (Tr. 33, 90; Employer Ex. 3). The Carrier Agreements are for three (3), six (6), nine (9) or twelve (12) months, but never longer than twelve (12) months. (Tr. 34). No experience is necessary to become a carrier. (Tr. 89).

The Carrier Agreement purports to create an “independent contractor” relationship, and states in its first paragraph:

Contractor is an independently established business and desires to contract to deliver newspapers and other associated items (hereinafter “product” published and/or provided by publisher. Both contractor and publisher fully and freely intend to create an independent contractor relationship under this contract.

(Employer Ex. 3, p. 1). This provision is completely non-negotiable. (Tr. 100). The Carrier Agreement purports to give the carriers the right to “control the manner and means of delivery,” and to “determine the equipment and supplies needed to perform delivery services.” *Id.* It also purports to give carriers the right to hire employees, and to engage in other businesses or to deliver papers for competing or non-competing companies. *Id.* Carriers are permitted to have other jobs, and some do. (Tr. 72). Some carriers are retirees. (Tr. 73). But, practically speaking, the carriers cannot work for other newspaper companies that have morning deliveries, and get the routes for the Herald Bulletin delivered by the 6:00 a.m deadline. (Tr. 140).

The Carrier Agreement requires the Herald Bulletin to provide a route list identifying the subscribers on the route. (Employer Ex. 3, p. 1). It specifies, however, that the carrier has “no right, title, interest or property right in the primary area of distribution or route list.” *Id.* Carriers cannot sell their routes to anybody else. (Tr. 141). The Carrier Agreement also requires the carrier to permit a Herald Bulletin representative to accompany her on the route to record the pattern of deliveries. (Employer Ex. 3, p. 1).

The Carrier Agreement requires the carrier to purchase the newspapers at a “negotiated” wholesale rate, and then resell the products at the retail price designated by the Herald Bulletin. (Employer’s Ex. 3, p. 2; Tr. 67). The retail rate is set exclusively by the Herald Bulletin. (Tr. 119). Thus, there is a per piece rate paid to carriers for each paper delivered, which is the difference between the retail rate charged to customers and

the wholesale rate paid by the carriers to the Herald Bulletin. (Tr. 65-67).

The Herald Bulletin at times will negotiate a route credit for certain routes that are not as profitable, such as where the distance between customers increases costs of delivery for carriers. (Tr. 66, 157). These route allowances are not contained in the standard Carrier Agreement, but are entered in the Herald Bulletin's computers. (Tr. 158). The route allowances have ranged between \$20 and \$600. (Tr. 198-99). Carriers also can earn money through tips from customers, which are obviously not negotiated items. (Tr. 67-68).

The "negotiation" over the wholesale rates paid and route credits are performed at the time carriers sign the agreement by the district managers, Brooks, or the circulation director. (Tr. 68-69). There is very little room for any real negotiation over these wholesale rates. Brooks admitted there is a cap of .085, and that the "negotiated" rate can only fall between .075 and .085. (Tr. 113-14). And, in fact, the Herald Bulletin had historically reserved to itself in the Carrier Agreement the right to, upon 30 days advance written notice, make changes in the wholesale rates that are "negotiated" with the contractor, although that language is apparently not in more recent agreements. (Petitioner's Ex. 4, Tr. 115-16).

The Herald Bulletin tracks monies owed to the carrier, and that the carrier owes the Newspaper. Carriers do not collect from subscribers; rather, subscribers pay directly to the paper's office. (Tr. 36). The Carrier Agreement gives the Herald Bulletin authority

to decide the appropriate payment period, although in practice the Herald Bulletin pays carriers bi-monthly. (Tr. 64). The Carrier Agreement also requires the carrier to furnish both a cash bond security deposit, and to pay a premium to purchase a surety bond, although the cash bond is typically waived. (Tr. 124-25; Employer's Ex. 3, p. 2). The surety bond required is usually in a very narrow range, between \$300 and \$500, and the Herald Bulletin facilitates the purchase through a bonding company and collects the premiums from the carrier. (Tr. 124-25).

The Herald Bulletin does not withhold any state, local or federal taxes from the checks they give carriers, and it provides a 1099 to carriers at the end of the year. (Tr. 69-70). Like haulers, the carriers do not receive any of the benefits that employees of the Herald Bulletin ordinarily receive. (Tr. 69-70).

The Carrier Agreement requires that the carrier deliver to all new customers as demanded by the Herald Bulletin, demands that the carrier establish payment and credit terms with new starts, and places the risk of loss for non-payment by these new starts on the carrier.⁶ *Id.* Although the carrier may solicit new customers, it may only be done at "terms, rates and conditions to which company agrees". (Employer Ex. 3, p. 3; Tr. 55). Carriers are paid \$20 on a one-time basis for new customers. (Tr. 55, 154). It is very rare for either haulers or carriers to bring in new subscribers. (Tr. 218).

The Carrier Agreement requires the carrier to supply his own vehicle, at his own

⁶ The agreement does give the carrier the right to stop delivering to a customer that has failed to pay. (Employer Ex. 3, p. 2).

expense, and requires him to maintain insurance on the vehicles and provide the Herald Bulletin with proof of coverage. (Employer Ex. 3, p. 2; Tr. 71). Carriers are prohibited from displaying the Herald Bulletin's name or logo on their vehicles. (*Id.*; Tr. 71). The carriers do not wear uniforms. (Tr. 71).

The Carrier Agreement indicates that the contract may not be assigned by the contractor, but that the contractor has the right to hire employees and substitutes as the contractor deems necessary. (Employer Ex. 3, p. 3; Tr. 58, 62-63). The carrier may not subcontract the route. (Tr. 141). Furthermore, the agreement does, in practice, limit the authority to hire employees and substitutes by demanding the "personal" work of the carrier, stating:

Contractor agrees that contractors' personal attention to fulfilling his contractual obligations was a substantial inducement from publisher to enter into this contract and contractor agrees to personally devote such time as is necessary to fulfill contractor's obligations under this contract.

(Employer Ex. 3, p. 3) (emphasis added).

The Carrier Agreement reserves to the Herald Bulletin the right to terminate the contract "immediately" if delivery is not "satisfactory" to its subscribers, meaning the regular and prompt delivery of the newspaper in satisfactory condition, prior to the delivery deadlines. (Employer Ex. 3, p. 4). Carriers are charged a \$5.00 penalty for customer complaints, in accordance with the contract. *Id.* This penalty amount is non-negotiable. (Tr. 126-27). The Carrier Agreement gives either party the right to terminate the contract without cause with thirty (30) days notice, or "for cause" with forty-eight

(48) hours notice. (Employer Ex. 3, p. 5). The Carrier Agreement also contains a liquidated damages provision for any breach, and the standard rate included within agreements is \$500, although a rate as low as \$200 has been “negotiated” previously. (Tr. 128).

The primary responsibility of carriers is to deliver newspapers in “clean, dry, convenient places” to subscribers. (Tr. 32). Carriers are assigned routes, which routes are determined by the Herald Bulletin. (Tr. 36). The Herald Bulletin maintains the right to change or alter routes at any time, and at times has divided routes to take subscribers away. (Tr. 136-38). About half of the carriers have more than one (1) route, and Brooks testified that some have as many as five (5) or six (6) routes. (Tr. 35-36). The smallest number of subscribers on any given route is roughly 20. (Tr. 188). The largest number of subscribers would be 200 to 300. (Tr. 188-89).

Carriers are expected to have completed their routes by 6:00 a.m. (Tr. 39). This delivery time is not negotiable. (Tr. 112). Generally, carriers are required to pick up their bundles by 3:00 or 3:30 a.m. in order to get their route done by that time. (Tr. 39). It takes carriers anywhere between 20 minutes to 2 hours to finish their route. (Tr. 39). Some carriers pick up their papers from places where the haulers have dropped them, and at least five (5) carriers pick up their papers directly at the Herald Bulletin dock in Anderson. (Tr. 39). The Herald Bulletin provides tables at their Anderson dock that carriers can use to prepare their papers for delivery, and approximately seven (7) or eight

(8) carriers use them. (Tr. 51).

The Herald Bulletin communicates with the carriers through what they call a “bundle top,” which is contained on their stack of papers every morning. (Tr. 53). This document identifies their paper, and includes information about the number of subscribers, customers who may be on vacation, whether particular customers have started or cancelled their subscription, and other notes from the Herald Bulletin. (Tr. 53-54).

In order to meet customer needs, and their responsibility to deliver papers in a clean and dry condition, carriers must sometimes purchase supplies, such as rubber bands and plastic bags. (Tr. 40-41). Carriers can purchase these supplies from the Herald Bulletin, and quite a few do. (Tr. 41). The Herald Bulletin sets the prices for these supplies, and the cost is deducted from the carriers’ bi-monthly checks. (Tr. 41-42; Employer’s Ex. 4). Although Brooks testified that carriers are not required to assemble or deliver the paper in a particular manner, carriers are required to deliver in a manner satisfactory to the customer. (Tr. 45). Furthermore, the Herald Bulletin requires carriers to use bags of a particular color for specific products, with different colored bags being used for the Herald Bulletin, the Indianapolis Star, and the Wall Street Journal, among others. (Tr. 143-45).

When potential carriers are deciding whether to take a route, the Herald Bulletin shows them the route and the subscriber list. (Tr. 36-37). District managers will go out

with new carriers to show them the route and help them find addresses, and sometimes previous carriers do as well. (Tr. 139, 177). The previous carrier generally provides a directional route showing how deliveries were made on that route, including the order of deliveries and the special customer instructions. (Tr. 37, 105-06). The Herald Bulletin does not create the directionals, but it generally collects them and passes them on to new carriers. (Tr. 37, 106). District managers will sometimes re-write a directional if it is in bad condition in order to give it to a new carrier. (Tr. 107). The carriers are not required to have a directional, and are not required to file them with the Herald Bulletin. (Tr. 37-38). Carriers can follow any delivery sequence they choose. (Tr. 52-53, 103).

In addition to delivering the Herald Bulletin, carriers are also required to deliver other products to subscribers on their route, including the Indianapolis Star, the Muncie Star, the Wall Street Journal and Barron's. (Tr. 52). The Herald Bulletin has an agreement with the Indianapolis Star, entered within the last year, to deliver not only the Indianapolis Star but other products such as the Wall Street Journal and Barron's. (Tr. 122). The Carrier Agreement requires the carriers to deliver these "auxiliary products" within their routes; the carriers have no choice. (Tr. 118-19, 122) (Employer's Ex. 3, p. 1, ¶3(d)). In fact, most routes include delivery items other than the Herald Bulletin. (Tr. 52). The wholesale rates paid to deliver these papers is also "negotiated" with the carriers by Herald Bulletin managers. (Tr. 71-72).

The carrier is responsible for dropping off newspaper tubes for customers who request them, which tubes are the property of The Herald Bulletin. (Tr. 146-47).

The Herald Bulletin has a dedicated hotline that carriers can call, which is manned beginning at 4:00 a.m., if they have problems, including too few papers or an inability to get to a customer's house. (Tr. 214). There will be an employee at the office who can run the papers out to the carriers. (Tr. 214).

If a customer complains about a carrier, customer service attempts to contact the carrier to resolve the complaint. (Tr. 55). If necessary, a district manager will take a paper to a customer. (Tr. 55-56). Any complaint deemed valid results in a \$5.00 charge to the carrier, which charge appears as a deduction on the carrier's twice monthly invoice, and is also identified on the "bundle top" the next day. (Tr. 56). Carriers are permitted to talk to the district manager to dispute charges, and an investigation could result in there being no charge. (Tr. 59-61). But as a matter of fact, the Carrier Agreement does not make the \$5.00 charge dependent upon whether the complaint has merit, and it is very typical for carriers to be charged complaint fees. (Tr. 138-39; Employer's Ex. 6). A \$5.00 charge may be assessed if a customer complains because her newspaper is placed in the wrong location. (Tr. 104-05).

E. Other indicia that the haulers and carriers are "employees" rather than "independent" contractors

There are a significant number of carriers and haulers who have been with The Herald Bulletin for many years as they continue to re-sign agreements. (Tr. 142-43).

Some have been there ten (10) years or more, and some have been there as long as twenty (20) years. (Tr. 143).

Brooks admitted that carrier and hauler income is “supplemental income and not a living wage.” (Tr. 80). Brooks also testified that as far as she knows all the distribution agreements entered into by the Herald Bulletin have been with individuals, as opposed to corporations or LLCs formed by the so-called “independent contractors.” (Tr. 81).

The Herald Bulletin has also tracked the movements of carriers and haulers in the past through use of a GPS system. (Tr. 107-08). The prior home delivery manager, Renee Newby, would have drivers use the GPS system, and provided instructions to them on how to use it in order to record the route mileage and the time that it took to deliver their route. (Tr. 110-11; Petitioner’s Ex. 2). Brooks claimed that the systems had not been used for over a year, and that drivers were not required to use the GPS if they chose not to. (Tr. 110).

The Herald Bulletin has put out a publication asking carriers to provide cell-phone numbers and e-mail addresses, although Brooks testified the carriers were not required to produce them. (Tr. 148-52; Petitioner’s Ex. 6). The district manager intends to send out similar communications to carriers on a monthly basis. (Tr. 152).

The Herald Bulletin communicates with carriers and haulers through other written messages as well, which generally are placed on “bundle tops” or with their invoices. (Tr. 211-12). Tony Rettig has communicated changes and updates to delivery procedures.

(Petitioner's Ex. 8; Tr. 160-61). A more permanent message to haulers and contractors is posted at the Herald Bulletin dock in Anderson, giving instructions about loading order and stating, among other things, that "no one may load out of order until each truck in order has the required amount on their manifest". (Tr. 163; Petitioner's Ex. 10). Rettig and district managers also have regular communications with carriers through appointments and phone calls. (Tr. 170).

The Herald Bulletin unilaterally announced to carriers the revision of distribution and quantities in areas for the Madison County Direct and Pendleton News products. (Petitioner's Ex. 11). The Herald Bulletin made the decision to make these changes and announced them without any negotiation with the contractors. (Tr. 168-69).

F. Brent Woolard

Brent Woolard has been a carrier for the Herald Bulletin for four (4) or five (5) years. (Tr. 222). Woolard does not have outside employment, although he has had work as a mechanic in the past during the day. (Tr. 223). Woolard began working for the Herald Bulletin when he talked to a district manager about taking on a route to earn extra money. (Tr. 223-24). Woolard was told he had the job before he completed any paperwork, and he signed a Carrier Agreement given to him by Barry Lacy, the district manager at the time. (Tr. 224).

Lacy showed Woolard various points in the agreement, but he did not engage in any give and take during the negotiations. (Tr. 224). Woolard was told during this

discussion that the independent contractor got paid \$ 0.076 to deliver a daily paper, and \$ 0.32 for a Sunday paper. (Tr. 225). Indeed, those numbers were already written in the contract and everything else was filled in on the agreement when Lacy brought it to him for his review and signature. (Tr. 225). Since then, Woolard has signed a succession of Carriers' Agreements, and on every occasion, a prepared contract was ready for his review. It usually took only a couple of minutes to sign, initial and date the agreement. (Tr. 225). There was never any negotiation. (Tr. 225).

When Woolard first started, all he delivered was the Herald Bulletin. (Tr. 226). In 2008, the Herald Bulletin required the carriers to begin delivering the Madison Direct. (Tr. 226). Carriers were told by district managers that the circulation director at the time, Dick Magrath, said that the Madison Direct either had to be delivered by carriers, or they would lose their routes completely. (Tr. 226). The carriers signed a separate agreement indicating what they would be paid for the Madison Direct. (Tr. 226). They were told that the amount they would be paid for this was \$0.09 apiece, and there was no discussion about it. (Tr. 227).

In October of 2008, the carriers started delivering the Indianapolis Star products. (Tr. 227). The carriers had no choice but to deliver these products. (Tr. 227). Carriers got paid to deliver these products, but did not get paid as much for them as they were paid for the Herald Bulletin. (Tr. 227-28).

Woolard indicated that the discussion about what they would be paid for the Indianapolis Star products was not really a negotiation. Woolard asked Tony Rettig what was the highest that they could pay him for delivering the Indianapolis Star, which Woolard knew to be the only product he would actually deliver. Rettig told him that it would be \$.07 for the daily and \$.19 ½ for Sunday. (Tr. 228). Woolard commented to Rettig that these deliveries were a lot more work than the Herald Bulletin, and that he was being paid a lot less for it, and asked Rettig how he could do that. (Tr. 228). Rettig responded that he could give him \$0.08 a day, and \$ 0.20 ½ for Sunday, but Dick Magrath would not let him go any higher than that. (Tr. 228). Woolard indicated he did not engage in any discussion regarding the price of the rest of the products because he knew he would probably never deliver any of them. (Tr. 228).

Woolard considers Mike Franklin to be his immediate supervisor because he is the district manager. (Tr. 228). Woolard has observed district managers filling in for other carriers, and the district manager is basically delivering that carrier's route. (Tr. 229). This happens particularly when a route is vacant, and a district manager may run the route for a month or more if he cannot fill it. (Tr. 229-30). When Woolard was first learning his route in a large trailer park, a district manager showed him the route for a week so he would know it. (Tr. 258).

Woolard has two routes. (Tr. 230). Woolard has approximately 105 papers with both the Herald Bulletin and the Indianapolis Star products on the first route, and around

200 customers with both products on the second route. (Tr. 230). Woolard estimates that he nets approximately \$10,000 a year on his routes, and at one point he had as many as four (4) routes, but he dropped two of them in October 2008. (Tr. 231-32). At the time he had four (4) routes, his son was helping him, without pay. (Tr. 231, 261). Woolard testified that he would not be able to deliver a third route without help by 6:00 a.m. (Tr. 232).

Woolard testified that at one point he attempted to sell subscriptions, but that it was very difficult to get sales. (Tr. 234). He testified it had been more than a year since he was able to sign up a new subscriber. (Tr. 235). Other than this, there is no way to earn additional money as a Herald Bulletin carrier. (Tr. 234). He also described the ongoing reduction in the subscriber base, noting that when he first started his Red Bud route, he had 236 customers on the weekend, but now he is down to 187 customers on the weekend. (Tr. 234-35).

Woolard indicated that if a customer complains, it is a rare occasion that he hears from a district manager or somebody else in the front office to ask for his explanation of what happened. Most of the time if there is a complaint, he just has \$5.00 deducted from his invoice and nobody even talks to him. (Tr. 235-36). Woolard indicated that on the few occasions that he approached the district manager when he had a charge for a customer complaint, and complained about the charge, he was charged anyway. (Tr. 244-45).

Woolard also testified that he is not aware of any carrier that has as many as five (5) routes. (Tr. 236-37). Woolard believed he was the biggest carrier for the Herald Bulletin when he had four (4) routes and approximately 500 customers, and he observed that he could not have done it without his twenty-year old son's help. (Tr. 237).

Rettig once threatened Woolard that he was not allowed to tell any other contractor what he was making or he would pull his contracts. (Tr. 237). Woolard purchases his supplies from the Herald Bulletin office, and is unaware of anywhere else that he could get them. (Tr. 237-38). Woolard does not believe the price list for these products is negotiable in any way. (Tr. 237-38).

Woolard testified that he grosses approximately \$600 every two weeks, before expenses. (Tr. 252-53). He is required to make delivery to every subscriber on his route, and he is required to put the paper exactly where they want it. (Tr. 253). Woolard has never hired a helper or a substitute. Although his son helped him, Woolard did not pay him. (Tr. 261).

G. Daisha Stone

Daisha Stone used to be a hauler for the Herald Bulletin. (Tr. 262-63). At the time she took the job in July of 2008, she signed a Hauler Agreement to work as a single copy hauler. (Tr. 263-64). Stone was also a carrier for her own route. (Tr. 264).

Stone went in to talk to Larry Himes, a district manager about her agreement. (Tr. 264). There was a discussion regarding the hauler price. (Tr. 265). She was told that she

had to be in Greenfield by 1:30 a.m. to pick up the papers, and at some point within four (4) months, she received a letter from Susan Brooks indicating that the time had been changed to 1:45 a.m. (Tr. 266). Stone was required to have the papers to the carriers by 3:00 a.m. at their pick up point as part of the hauler agreement. (Tr. 266). As a hauler, Stone would drop between 1,000 to 1,200 papers, depending upon the day. (Tr. 268). Stone loaded the vehicles herself into her vehicle at the Greenfield site. (Tr. 268).

At the end of November/beginning of December 2008, the Herald Bulletin wanted to add another 300 papers to her hauling duties on certain dates, and Stone attempted to renegotiate her deal because all of those papers would not fit into her vehicle. (Tr. 269). She spoke with the district manager, Larry Himes, and he said he would try to accommodate it. Himes eventually came back and said that Amy, the circulation director, would not allow him to give her any more money to accommodate those extra papers. Stone responded by giving her thirty (30) day notice because she could not have the responsibility of driving two vehicles to pick up her load. (Tr. 269-70). The district manager gave her a couple of days to think about it, because he wanted to keep her as a hauler. (Tr. 270). The next day, Stone called Himes to tell him that she had decided to keep the route, but Himes told her she needed to bring her keys in. (Tr. 270). She was being terminated. (Tr. 270).

H. Mike Witsken

Mike Witsken is a carrier for The Herald Bulletin, and has been for approximately four (4) years. (Tr. 279-80). The carrier work is his only job. (Tr. 280). He was signed up as a carrier through Sandy Stanley, who was a district manager. (Tr. 281). Witsken met with Stanley to look over the paperwork and discuss the contract. (Tr. 281). There were no negotiations when they had this discussion. (Tr. 281-82). Witsken had thrown out a figure of \$0.10 or \$0.11 per paper, but was immediately told that would not work. Witsken asked Stanley what is the maximum that she could give, and she said \$0.08 or \$0.085. (Tr. 283).

Witsken has four (4) routes. (Tr. 283-84). Witsken indicated that nobody has ever negotiated with him over the price of the Indianapolis Star products, and he really does not know what he is being paid, except that an amount shows up on his pay statement. (Tr. 284). He did not sign a separate agreement agreeing to deliver these other products. (Tr. 285). Nor was he ever asked to sign a separate agreement or to have any discussion about how much he would be paid. (Tr. 285).

Witsken receives approximately \$700 on his bi-monthly paycheck. (Tr. 288). This does not reflect any of his business expenses. (Tr. 288-89). There have been occasions where previous district managers have delivered papers for his route, such as one time he called in, or where he missed a customer. (Tr. 289-90). One time Sandy filled in for him so he could go on vacation, and he just did not get paid for those days. (Tr. 290).

III. ARGUMENT

The haulers and carriers are employees, rather than independent contractors, within the meaning of Section 2(3) of the Act. Even without overturning *Arizona Republic* and *St. Joseph News-Press*, consideration of the factors for distinguishing employees from independent contractors should lead to the conclusion that the haulers and carriers in this case are employees rather than independent contractors. In this respect, certain facts here distinguish this case from *Arizona Republic* and *St. Joseph News-Press*. In any event, as Chairman Liebman pointed out in her dissents, the holdings of those decisions are deeply flawed because they fail to take into account the economic dependence of the carriers and haulers on the publisher. And when that additional factor is given the appropriate weight, the balance shifts dramatically in favor of determining that the haulers and carriers are employees as defined in the Act.

A. Relevant Legal Standards

Section 2(3) of the Act provides that: “the term ‘employee’ shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor[.]” 29 U.S.C. § 152(3). Given the Act’s failure to set forth a standard for determining the difference between an employee and an independent contractor, the Supreme Court has declared that the Board and courts should “apply general agency principles” in making that distinction. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968).

The dispute that arose between the Board majority and the dissenting member in the *St. Joseph News-Press* and the *Arizona Republic* decisions centered on whether the economic dependence of a so-called “contractor” is among the factors that should be considered in applying the common law agency test. *St. Joseph News-Press*, 345 NLRB at 481, 484; *Arizona Republic*, 349 NLRB at 1043 n.4 and 1046. The majority concluded that this factor could not be considered as part of the common law agency test, as it is not expressly listed in the Restatement (Second) of Agency test cited by the Supreme Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), which the Board itself adopted itself in *Roadway Package System*, 326 NLRB 842, 850 (1998), and *Dial-A-Mattress*, 326 NLRB 884 (1998). In *Roadway* and *Dial-A-Mattress*, a full Board panel rejected the employers’ argument that the so-called “right to control” factor should outweigh the other common law factors in making the determination whether an individual is an employee or independent contractor, holding that the Restatement (Second) of Agency, Section 220, set out the appropriate common law criteria for making such determinations. Then-Member Liebman noted that the Restatement test refers to ten (10) pertinent factors “among others,” and as such, that the test contemplates that other relevant factors – such as economic dependence – may exist under the factual circumstances presented. *St. Joseph News-Press*, 345 NLRB at 484.

Leaving aside for the time being whether “economic dependence” is a relevant consideration, there is no dispute that the following nine (9) factors identified in the

Restatement are considered by the Board in determining independent contractor status:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Arizona Republic, 349 NLRB at 1042 (quoting Restatement (Second) of Agency § 220(2)).

B. The balance of the *Arizona Republic*/*St. Joseph News-Press* factors weighs in favor of concluding the carriers and haulers are employees.

In considering these factors, the balance weighs significantly in favor of concluding that the haulers and carriers working for the Herald Bulletin are in fact

employees, rather than “independent contractors.” In this respect, the facts here are distinguishable in certain key respects from the facts of the *Arizona Republic* and *St. Joseph News-Press*, in which the Board concluded that the newspaper carriers at issue were independent contractors.

1. Factors that Board has found support employee status

Just like in *Arizona Republic* and *St. Joseph News-Press*, there is no room for the Herald Bulletin to dispute that with respect to at least four (4) of the nine (9) factors, the haulers and contractors clearly appear to be statutory employees rather than independent contractors.

a. Integral Part of Business

The delivery of newspapers on a daily basis by haulers and carriers to the 14,500 subscribers of the Herald Bulletin is plainly integral to the business of newspaper distribution. *Arizona Republic*, 349 NLRB at 1046; *St. Joseph News-Press*, 345 NLRB at 479.

b. Level of Skill Required

No experience whatsoever is necessary to become either a hauler or a carrier. (Tr. 90). Carriers and haulers need only be able to drive a car, and in the case of carriers, keep track of subscriber locations and subscriber instructions in order to perform their job (and most of this information is provided to the carrier upon assuming the route). This is by no

means skilled work. *Arizona Republic*, 349 NLRB at 1046; *St. Joseph News-Press*, 345 NLRB at 479.

c. Duration of the Work

Carriers and haulers are not hired on a short-term basis, even though their agreements purport to last for only between three (3) to twelve (12) months. Practically speaking, many of the carriers and haulers have been with the Herald Bulletin for ten (10) years or more, and some have been with it for more than twenty (20) years. (Tr. 142-43). The two carriers who testified, Brent Woolard and Mike Witsken, had been with the paper for between four (4) and five (5) years. (Tr. 222, 279-80). In *Arizona Republic*, the newspaper had similar agreements that purported to last for between three (3) and twelve (12) months, yet the Board noted that in reality carriers worked for far longer periods, and as such, that this factor supported a finding of employee status. 349 NLRB at 1046.

d. Similar Work Performed by Employees of the Principal

The district managers for the Herald Bulletin will perform delivery work on carrier or hauler routes that are open or when carriers are absent, sometimes for as long as a month or more. (Tr. 77, 229-30, 289-90). The district managers will also help new carriers perform the route, as a means of teaching them the work. (Tr. 258). District managers or other employees will also deliver newspapers to customers who have complained. (Tr. 289-90). This factor therefore supports a finding of employee status. *Arizona Republic*, 349 NLRB at 1046.

2. Factors that the Board found supported independent contractor status

As to the remaining five (5) factors, which the Board found indicative of independent contractor rather than employee status in *Arizona Republic* and *St. Joseph News-Press*, there are some significant differences between the facts present there and here.

a. Hiring Party's Degree of Control

The Herald Bulletin maintains a great deal of control over the details of the carriers' and haulers' work, and overall this factor is more indicative of employee status than independent contractor status. The Herald Bulletin determines both the pick-up points (the Anderson and Greenfield locations (Tr. 11)) and the delivery points for haulers. (Tr. 11, 18-19, 158-59). The Herald Bulletin also determines the pick-up and delivery points (subscriber locations) for carriers. *Id.* Although haulers and carriers may make suggestions, the Herald Bulletin maintains control over that basic function of the job. *Id.*

The Herald Bulletin sets for both haulers and carriers the days of work (every day), and the ending times by which the work must be performed (3:30 a.m for haulers, and 6:00 a.m. for carriers). (Tr. 90-91). Although the Herald Bulletin purports to give the haulers and carriers some discretion regarding when they pick up their papers, this discretion is illusory, because in order to meet the delivery deadlines, the haulers and carriers must generally pick up the papers at specific times. Furthermore, the Herald

Bulletin suggests that haulers pick up their papers by no later than 2:00 or 2:30 a.m. (Tr. 205-06). Former hauler Daisha Stone testified that she was told to pick up her papers by 1:30 originally, which was later unilaterally changed to 1:45. (Tr. 265-66). At a minimum, the haulers and carriers both have very narrow windows in which to perform their work every day. This is not reflective of independent contractor status.

The Herald Bulletin prepares manifests showing the drop locations and number of papers to drop for haulers. (Tr. 17-18). Although haulers may, in theory, change the sequence of deliveries, any such changes are communicated to the Herald Bulletin, which updates its computer system. (Tr. 20).

Both the Hauler Agreement and the Carrier Agreement reserve a great deal of control to the Herald Bulletin. The Newspaper may cancel the agreements at any time for any reason, with thirty (30) days written notice. (Employer Ex. 1, p. 4; Tr. 14). The Herald Bulletin maintains the right to change or alter routes. (Tr. 136-38; Employer Ex. 1, p. 1). The Carrier Agreement grants the Herald Bulletin the right to have one of its employees accompany the carrier on their route, with minimal notice to the carrier. (Employer Ex. 3, p. 1). Carriers are required to deliver to every customer of the Herald Bulletin, and are required to deliver the product in a manner satisfactory to the customer, meaning the carrier must meet customer demands. (Tr. 45).

Both the Hauler Agreement and the Carrier Agreement prohibit subcontracting or the assignment of the agreement, and require the contractor to “personally” devote all

necessary time to the route. Thus, although the agreements state that the contractor may hire employees or substitutes, in practice, if a contractor were to do so on any sort of permanent basis, he or she would violate the obligation to “personally” devote time to the route. By inserting this requirement, the Herald Bulletin maintains control over the persons who deliver its product (like it would if it hired employees) while furthering its illusion of creating a more “independent” relationship.

The Herald Bulletin also requires the haulers and carriers to deliver the “auxiliary products” such as the Indianapolis Star, the Wall Street Journal, and the Muncie Star, and they have no choice whatsoever in this matter. (Tr. 52, 118-19, 122; Employer Ex. 3, p.1). Carriers have been threatened with having their contracts terminated for refusing to deliver an auxiliary product. (Tr. 226). The Herald Bulletin has unilaterally announced changes in the delivery of these products without negotiating with contractors. (Tr. 168-69; 284-85). Carriers are also required to drop off newspaper tubes owned by the Herald Bulletin. (Tr. 146-47).

In both *Arizona Republic* and *St. Joseph News-Press*, the Board concluded that this factor of employer control weighed in favor of independent contractor status for the carriers at issue there. In *Arizona Republic*, the facts established that the carriers could change their order of deliveries, refuse to deliver to customers they deemed unlikely to pay or to whom it would be economically unfeasible to deliver, and disregard customers’ delivery requests without fear of discipline. 349 NLRB at 1043. Unlike *Arizona*

Republic, the carriers here are required to deliver to every customer on their route.

Failure to do so will result in a \$5.00 per customer charge, and could result in their immediate termination for failure to deliver satisfactory service or a thirty (30) day notification of cancellation.

Also unlike *Arizona Republic*, carriers are disciplined if they fail to deliver a paper in accordance with customer requests and a customer complains. Specifically, the carriers receive a \$5.00 charge against their income, and the facts establish that carriers can do very little about it. (Tr. 55-56, 104-05, 138-39). This happens to carriers quite frequently. (Employer's Ex. 6). Even when a district manager does bother to talk to a carrier about the customer complaint, it rarely does any good. As Brent Woolard testified, on the few occasions he approached a district manager to complain about the charge, he was charged anyway.

Also, unlike in *St. Joseph News-Press*, the carriers here do not bill customers, extend credit, or collect payments from subscribers, a significant difference in the general entrepreneurial nature of the enterprise. Although the majority attempted to minimize this factor in *Arizona Republic*, noting that not all of the carriers billed subscribers, this is one additional factor that weighs in favor of concluding that the carriers are employees. Furthermore, there is no indication that the employers in those cases used a GPS system to track the movements of contractors, like the Herald Bulletin has done at times in the past. (Tr. 107-08, 110-11). Taken as a whole, the facts here establish that the Herald

Bulletin maintains significant control over the work performed by the carriers and the haulers, and is indicative of employee status.

b. Hiring Party's Degree of Supervision

As set forth above, there is some degree of supervision over the activities of carriers, and some degree of discipline issued to carriers who fail to properly deliver newspapers, in the form of \$5.00 penalties. The contract also reserves to the Herald Bulletin the right to give the ultimate penalty – termination of the agreement – for poor performance under the contract. This distinguishes this case from *Arizona Republic*, 349 NLRB at 1043, and *St. Joseph News-Press*, 345 NLRB at 475, where the Board found there was no disciplinary system for carriers.

Furthermore, Herald Bulletin supervisors do have a significant amount of interaction with carriers and haulers. The district managers will show new and potential carriers their routes, and help them find addresses. (Tr. 139, 177). The Herald Bulletin collects and distributes directionals prepared by prior carriers showing the locations of customers, delivery instructions, and travel routes. (Tr. 37, 105-06). The Herald Bulletin also makes a hotline available to carriers to call with problems. The hotline is staffed by Herald Bulletin employees. (Tr. 214).

The Herald Bulletin invites haulers to meetings. (Tr. 27-28). The Herald Bulletin communicates with carriers through “bundle tops,” and they include messages on various topics, including a list of the subscribers, the customers on vacation, and other

information. (Tr. 53-54). Overall, this factor also weighs in favor of finding employee status.

c. Provisions of Supplies, Instrumentalities, and Places of Work

Carriers and haulers must provide their own vehicles, and provide insurance and other maintenance on them. However, the Herald Bulletin does provide some supplies for purchase, such as rubber bands and bags, at non-negotiable prices. (Tr. 40-41, 237-38). The Herald Bulletin requires the carriers to use particular color bags for certain products, with different colors being used for the Herald Bulletin, the Indianapolis Star, and the Wall Street Journal. (Tr. 143-45). The Herald Bulletin also makes tables available to carriers at its Anderson dock to prepare their papers for delivery, of which some carriers take advantage. (Tr. 51). Thus, there is some provision of supplies, materials, and places of work for carriers.

d. Method of Compensation and Entrepreneurial Potential

The carriers are paid on a piece rate, and the haulers are paid a flat rate, both on a bi-monthly basis. The Herald Bulletin does not withhold taxes and issues them a 1099. It also does not pay them any benefits or reimburse them for expenses. Although these factors are suggestive of an independent contractor relationship, a closer look at the compensation method and the “negotiation” process reveals that it is all a sham designed to hide the true relationship between parties with completely unequal bargaining power.

The idea that haulers and carriers “negotiate” their rates or that they have any entrepreneurial potential whatsoever borders on the absurd. The Herald Bulletin dictates the terms of the agreement, with very little room for movement on any of the terms of either the Hauler Agreement or the Carrier Agreement.⁷ Indeed, the Herald Bulletin’s witness admitted that most of the terms of these agreements are completely non-negotiable. The haulers and carriers must agree in total to the language stating that they are “independent contractors.” (Tr. 89-90, 100). Likewise, there is no room for negotiation over the time by which papers must be delivered. (Tr. 112).

As to compensation, the Herald Bulletin’s “negotiators” have very limited authority. Carrier Woolard’s “negotiation” with a district manager consisted of him being told what his rates were, and they were written in his agreement prior to any “negotiation.” (Tr. 224-25). Carrier Witsken testified that the negotiation for his agreement consisted of him throwing out a rate of \$.10 or .11 per paper, and being told immediately it would not work, to which he asked the district manager what the highest rate she could give was, who responded \$0.085 per paper. (Tr. 283). This is consistent with Brooks’ testimony that the range of negotiation was limited to between \$0.075 and \$0.085. (Tr. 113-14). This is not negotiation at all. It is merely a question of whether the carriers have asked questions to find out what other carriers have received so that they

⁷ Among the terms that are actually “negotiable” are the amount of the hauler’s and carrier’s surety bond, which varies only between \$300 and \$500, an irrelevant difference. (Tr. 20-21). Likewise, the liquidated damages provision, which is usually \$500, has been negotiated down to \$200, another insignificant difference. (Tr. 128).

do not accept the lower end of this limited scale. Since the retail price of the paper is set by the Herald Bulletin, the carriers have no ability to increase their earnings by changing the price at which they sell the paper. (Employer's Ex. 3, p.2; Tr. 67).

The existence of "route allowances" paid to certain carriers on routes that are "less" profitable is particularly telling regarding the sham nature of these "negotiations." (Tr. 66, 157-58, 198-99). The fact is that these "route allowances" would be completely unnecessary if carriers and the Herald Bulletin were engaged in a true negotiation over the wholesale rate. These unprofitable routes could be made profitable merely by adjusting the wholesale rate for each delivery, but the Herald Bulletin's negotiators lack the authority to pay an appropriate rate on such routes, but rather are limited to their top rate of \$0.085 per paper. Instead, the Herald Bulletin has created the route allowance to deal with this deficiency in the negotiation process. The fact that these "route allowances" do not appear in the "independent contractor" agreement (Tr. 158) is particularly telling, since to place them in the document itself would pierce some of the facade created by these elaborate, self-serving documents.

The same limited "negotiation" authority is present in hauler rate negotiations, although they are slightly more complex since a flat rate is negotiated, which rate is usually based on the historical payment made for that route based upon numbers of papers delivered and drops. (Tr. 23-24, 93-94)

Furthermore, the haulers and carriers have no property interest in their routes, per their agreements, which means they have no ability to sell the route at a profit should they increase their customer base through hard work or the development of new subscribers. (Employer Ex. 1, p. 1; Employer Ex. 3, p. 1; Tr. 141). The haulers and carriers cannot work for competitor newspapers that deliver a morning paper, since they would not have time for it. (Tr. 140). Although the haulers and carriers are paid \$20 for generating new customers, it very rarely happens. (Tr. 154, 218). The fact is that the print newspaper business is losing subscribers in the digital age, not gaining them, so this presents no real opportunity for carriers and haulers to “increase” their profits. (Tr. 234-35). Any suggestion to the contrary is blind to reality.

In addition, the haulers and carriers have no real opportunity to increase their profit margin through the hiring of helpers or substitutes. First, the language of the Hauler Agreement and the Carrier Agreement discourage such activities by stating that the Herald Bulletin is contracting for the “personal attention” to the route by the contractor. (Employer Ex. 1; Employer Ex. 3, p. 3). This is a cleaner way for the Herald Bulletin to say, “we are really hiring you to do this job, so we expect you to do it, and not hire it out.” Failure to abide by this provision can result in cancellation of the agreement.

Second, by the admission of the Herald Bulletin’s own witness, these jobs do not even pay a “living wage” and are in some cases supplementary income for haulers and carriers. (Tr. 80). Woolard testified that he grosses \$600 every two weeks on his two (2)

routes, before expenses, so even if he were permitted to hire helpers or substitutes at a minimum wage (and he is not permitted to do so, on any regular basis, per the agreement which requires his “personal” efforts), any “profit” margin he would earn is minuscule at best. Likewise, Witsken grosses \$700 every two (2) weeks for his four (4) routes, and he could not afford to hire a substitute or helper on a regular basis. (Tr. 288-89).

Furthermore, the Herald Bulletin facilitates certain other aspects of the “independent contractors” businesses, showing them to not be independent or entrepreneurial at all. For instance, the Herald Bulletin performs all of the bookkeeping under the independent contractor agreements, calculating charges and rates paid for newspapers, along with tips. (Tr. 36). The Herald Bulletin helps the haulers and carriers purchase worker’s compensation insurance for themselves and deducts premiums from their bi-monthly payments. (Tr. 28-29, 166-67). The Herald Bulletin facilitates the purchase of a surety bond from a bonding company, and collects the premiums from the carrier. (Tr. 124-25).

Finally, the Herald Bulletin is not dealing with businesses. The contractors have not formed corporations or LLCs to run their enterprise out of (Tr. 81), which would be the sensible thing to do if they were truly intending to hire employees or substitutes on a regular basis. Taken collectively all of these facts reveal that this factor weighs in favor of a finding of employee rather than independent contractor status.

All of these facts are different from those present in *Arizona Republic* and *St. Joseph News-Press* in several respects. The carriers in those cases were allowed to hire full-time substitutes and control their compensation. 349 NLRB at 1044; 345 NLRB at 479. The Hauler Agreement and Carrier Agreement here prohibits that as they require the “personal” attention of the contractors, and states that their personal involvement is a material term of entering into the agreement with them. In *Arizona Republic*, some carriers formed their own corporations, and entered into agreements in their corporate or business name, unlike here. 349 NLRB at 1044-45. Furthermore, substantial evidence is present here that the rates negotiated with carriers and haulers are not really “negotiated” rates at all, but rather a pre-determined rate within a narrow range. The Board also placed substantial emphasis in those cases on the potential of carriers to increase their earnings by soliciting new customers, a potential that the evidence establishes is simply not present here. 349 NLRB at 1044-45; 345 NLRB at 475.

e. Parties’ Intent

According to the majority in *Arizona Republic*, the fact that the agreements state they intend to create an independent contractor relationship is enough to sway the balance, without any consideration of the fact that this term of the agreement is completely non-negotiable as pointed out by the dissent. 349 NLRB at 1045. The dissent takes the correct view – that these are really contracts of adhesion and that the contract itself is “dubious at best” of the contractors’ intent. *Id.* at 1047.

C. Economic dependence of the haulers and carriers is a relevant factor that should be considered.

Chairman Liebman's dissent in both *Arizona Republic* and *St. Joseph News-Press* takes the more appropriate view that one additional factor should be added to the common law agency test, namely the economic dependence of the carriers and haulers on the Newspaper. *St. Joseph News-Press*, 345 NLRB at 483-87. Consideration of this additional factor alone, even if all the factors found by the Board in *Arizona Republic* and *St. Joseph News-Press* were weighed in favor of independent contractor status, would tilt the balance firmly in favor of a finding of employee status for the carriers and haulers.

No one can look at the relationship between the carriers and haulers on the one-hand, and the Herald Bulletin on the other, and conclude that this is an arms-length relationship between two sets of businesspeople in the marketplace. The Newspaper completely controls the working conditions of the carriers and haulers, just as then-Member Liebman pointed out was the case in both *St. Joseph News-Press* and *Arizona Republic*. The Herald Bulletin may terminate the agreement unilaterally on thirty (30) days notice. The contract sets the wholesale price for carriers in a very narrow range, and the Herald-Bulletin controls the retail price, thus limiting opportunities for profit. The same is true with the narrow flat-rate negotiation of the haulers agreements. The prices and profits are fully controlled by the Herald Bulletin. The Herald Bulletin controls the routes and can change them at will. All of these factors weigh in favor of concluding that the carriers and haulers are economically dependent upon the paper, and this is one more

fact that weighs in favor of a finding of employee status.

IV. CONCLUSION

For all the foregoing reasons, the carriers and haulers should be deemed statutory employees within the meaning of Section 2(3) of the Act, the Regional Director's contrary decision should be reversed, and the Board should order the Regional Director to direct an election among the employees in the petitioned-for unit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September, 2010, a copy of the foregoing brief was filed electronically. Notice of this filing will be sent to the following parties via e-mail as stated below:

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